No. 12-2786-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WNET, THIRTEEN, FOX TELEVISION STATIONS, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WPIX, INC., UNIVISION TELEVISION GROUP, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, AND PUBLIC BROADCASTING SERVICE,

Plaintiffs-Counter-Defendants-Appellants,

v.

AEREO, INCORPORATED, f/k/a BAMBOOM LABS, INCORPORATED,

Defendant-Counter-Claimant-Appellee.

(*caption continued on inside cover*)

On Appeal From The United States District Court
For The Southern District of New York
Case Nos. 12-cv-1540 AJN and 12-cv-1543 AJN
Honorable Alison J. Nathan, District Judge

AMICI CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, AND THE CONSUMER ELECTRONICS ASSOCIATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

Mitchell L. Stoltz
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
mitch@eff.org
Counsel for Amici Curiae EFF and CEA

Sherwin Siy
John Bergmayer
PUBLIC KNOWLEDGE
1818 N Street NW, Suite 410
Washington, DC 20036
Telephone: (202) 861-0020
Facsimile: (202) 861-0400
ssiy@publicknowledge.org
Counsel for Amicus Curiae Public Knowledge

On the brief:
Michael Petricone
CONSUMER ELECTRONICS ASSOCIATION
1919 S. Eads St.
Arlington, VA 22202
Telephone: (703) 907-7600
Facsimile: (703) 907-7675
MPetricone@ce.org

No. 12-2807-cv

AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., CBS STUDIOS INC., NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS, LLC, UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC and WNJU-TV BROADCASTING LLC,

Plaintiffs-Counter-Defendants-Appellants,

v.

AEREO, INC.,

Defendant-Counter-Claimant-Appellee.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae Electronic Frontier Foundation, Public Knowledge and the Consumer Electronics Association each state that they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

Dated: October 26, 2012

Respectfully submitted,

/s/ *Mitchell L. Stoltz*

Mitchell L. Stoltz
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
mitch@eff.org

Attorneys for Amici Curiae

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STATEMENT OF INTEREST[1]

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 19,000 contributing members. On behalf of its members, EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity and innovation. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence. EFF has contributed its expertise to many cases applying copyright law to new technologies, as *amicus curiae*, as party counsel, and as court-appointed attorneys *ad litem*.[2]

Public Knowledge is a non-profit public interest 501(c)(3) corporation, working to defend citizens' rights in the emerging digital culture. Its primary mission is to promote online innovation, protect the legal rights of all users of copyrighted works, and ensure that emerging copyright and telecommunications policies serve the public interest. Applying its years of expertise in these areas,

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for the undersigned, has authored this brief in whole or in part, or contributed money towards its preparation. All parties have consented to the filing of this brief.

[2] Mitchell Stoltz, counsel for EFF, was formerly an associate at Constantine Cannon LLP, which represents Aereo in these actions. Neither Mr. Stoltz nor EFF have any present affiliation with Aereo.

Public Knowledge frequently files *amicus* briefs in cases that raise novel issues at the intersection of media, copyright, and telecommunications law.

The Consumer Electronics Association (CEA) is the preeminent trade association promoting growth in the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold to consumers. Its more than 2,000 corporate members contribute more than $125 billion to the U.S. economy.

INTRODUCTION

Amici file this brief because there is much more at stake in this litigation than the continued operation of one company. The underlying issue raised here is whether copyright holders can be permitted to reach beyond their statutory rights to prohibit follow-on innovation, and to regulate personal, everyday uses of free television broadcasts. This issue is of profound importance to the public. If Plaintiffs' arguments are accepted, the carefully crafted balance embodied in the Copyright Act could be upended, to the detriment of the public interest. Amici urge the Court to affirm the decision below on the merits but clarify that the public interest in copyright cases such as this one is not confined to mere enforcement.

ARGUMENT

I. Plaintiffs Seek to Enforce Rights They Do Not Have.

A. Copyright is a Creature of Statute; Unenumerated Rights Remain with the Public.

Plaintiffs and their amici suggest that any technology that uses copyrighted works *must*, through some operation of law, require a license from copyright holders.[3] That notion must be rejected. Copyright in the United States is a

[3] *See, e.g.*, Brief for Plaintiffs-Counter-Defendants-Appellants WNET, *et al*. 8 ("WNET Br.") (arguing that "a business" cannot aid individuals in receiving programming that is "made available to viewers for free over the airwaves"); Brief of Amicus Curiae Ralph Oman 9 ("Oman Br.") (arguing without authority that the Court should resolve all statutory ambiguities in favor of the copyright holder);

"creature of statute." *Stewart v. Abend*, 495 U.S. 207, 251 (1990). It "does not exist at common law—it originated, if at all, under the acts of [C]ongress." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834). Thus, the rights of authors are *only* those rights specifically enumerated in statute. All other rights remain with the public. M. Nimmer, 2 Nimmer on Copyright § 8.01[A] ("Nimmer") ("the rights of a copyright owner . . . are rights of express enumeration.").

That is as it should be, because the Copyright Act embodies a carefully crafted balance between the rights of authors and those of the public. *See generally Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

B. Copyright Holders Are Not Entitled to Compensation For Private Performances.

Section 106 of the Copyright Act lists six exclusive rights granted to copyright holders. With respect to performances, Section 106 grants copyright holders an exclusive right only in performances and transmissions that are "to the

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Brief of Amici Curiae Am. Soc. Of Composers, Authors, & Publishers, *et al*. 14 ("ASCAP Br.") (arguing that the law must stop "parasitic businesses from exploiting copyrighted works without permission").

public." Thus, copyright holders have no right to compensation for performances and transmissions that are not "to the public."

This Court applied that fundamental principle in *Cartoon Network LP v. CSC Holdings, Inc*. Cablevision's remote DVR makes private performances. As Section 106 contains no exclusive right of private performance, use of a remote DVR is outside copyright holders' control. 536 F.3d 121, 140 (2d Cir. 2008). That the ability to perform that use was valuable, that Cablevision "built a business"[4] around it, and that the plaintiffs had no control over it, did not change the Court's decision. Neither the commercial value of a challenged use, nor the plaintiffs' lack of control over that use, nor the defendants' commercial exploitation of that use have any bearing on the infringement question, because none of those criteria appear in Section 106.

The same principle obtains here. Aereo followed the guidance of this Court as to the definition of a private performance, and designed a system that enables its customers to experience private performances of programs those customers may already lawfully access. Aereo has built a business in the wide-open realm that Congress reserved to the public, not the well-defined reservation set aside as reward and incentive for authors.

[4] WNET Br. 34.

Plaintiffs and their amici nonetheless insist that profiting from another's work without compensation is inherently wrongful. The WNET Plaintiffs claim copyright law forbids any business "where it appears that the alleged infringer has built [that] business around the unlicensed retransmission of programming owned by others." WNET Br. 21. ASCAP calls Aereo "parasitic" because it is "exploiting copyrighted works without permission." Brief of Amici Curiae Am. Soc. of Composers, Authors, & Publishers, *et al*. 14 ("ASCAP Br."). Ralph Oman, a former Register of Copyrights, "urge[s] the court to . . . find[] in favor of the copyright holder" as often as possible because, he claims, attempting to build a business based on lawful, non-exclusive uses of copyrighted works is mere "game-playing." Brief of Amicus Curiae Ralph Oman 9 ("Oman Br."). Register Oman cites no authority for this extraordinary claim beyond his personal opinion.

In fact, making or enabling private performances, even for profit, is not wrongful. There is no exclusive right to *use* a copyrighted work, or to receive compensation for any commercial use of a work. Uses of works, and businesses built around those uses, require permission and payment *only* when those uses fall within the enumerated rights. As the Supreme Court observed, "[i]t may seem unfair that much of the fruit of the [plaintiff's] labor may be used by others without compensation. . . . [T]his is not 'some unforeseen byproduct of a statutory scheme.' . . . It is, rather, 'the essence of copyright.'" *Feist Pubs., Inc. v. Rural*

Tel. Svc. Co., 499 U.S. 340, 349 (1991) (citations omitted); *see also* 2 Nimmer § 8.01[A] ("Not every unauthorized exploitation of a work . . . necessarily infringes the copyright. . . . Thus, the suggestion in certain cases that use alone constitutes infringement is in error."). Makers of televisions "buil[d] a business"[5] on the back of Plaintiffs' valuable programming, but no one would suggest they owe royalties as a result. Movie theaters would sell no popcorn were it not for the popular appeal of the movies they exhibit, yet movie producers have no right under copyright law to a cut of popcorn profits.

Thus, the Court should give no weight to the protestations of the networks and their amici that Aereo will harm them commercially, that the networks have lost some measure of control over uses of their works, or that Aereo derives revenue indirectly from use of Plaintiffs' programs. Plaintiffs have no right to block, control, or profit from private performances, including private performances of a commercial nature.

Likewise, in deciding whether equity warrants granting a preliminary injunction, the Court should not burden lawful commerce and innovation in the public right-of-way that lies outside the property lines of the Section 106 rights. The Court's analysis of harm, the balance of hardships, and the public interest must include due consideration of the rights that Congress reserved to the public.

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[5] WNET Br. 21.

II. Aereo's System Makes Private Performances.

Underneath their seeming complexity, the substantive arguments in this case are quite simple. Amici ASCAP, *et al*. put this well, "the only question is whether the relevant performances are 'public.'" ASCAP Br. 10. The answer is equally simple: they are not. They are separate transmissions from a private antenna to a personal copy, and then to a home user. These transmissions cannot be "aggregated" with other private transmissions to create liability.

Plaintiffs make the case more complicated than necessary, concocting a theory—the unbroken "chain of transmission"—that has no basis in law and contributes nothing to the Court's analysis. The Court should disregard this inappropriate approach.

A. Private Transmissions Cannot Infringe the Public Performance Right.

Aereo is liable if, and only if, it *publicly* performs the broadcasters' works. Because the "performances" at issue here are private, Aereo is not liable.

1. <u>Only the Viewer Perspective is Relevant to the Public/Private Distinction.</u>

Plaintiffs erroneously interpret the public performance right to mean that TV viewers may only watch broadcast signals through home antennas, or by paying for a cable or satellite TV subscription. But nothing in the text of the Copyright Act or the actual practice of broadcast TV viewing justifies this cramped reading. Rather,

as *Cartoon Network* makes clear, a "transmission" is a lawful private performance when it is sent from remote facilities to a household, because it is legally indistinguishable from the "transmission" from a rooftop antenna to a TV screen. *Cartoon Network* distinguishes *making a public performance* from *enabling a private performance*, a distinction which preserves the role of copyright as an economic incentive for creativity while preserving the public's right to experience that creativity in the manner of its choosing, maximizing the public benefit.

Consider the following activities:

- Watching broadcast TV from the living room with a 'rabbit ears' antenna;
- Watching broadcast TV from the living room with a roof-mounted antenna;
- Watching broadcast TV on a bus using a handheld TV receiver;
- Watching broadcast TV received by a roof-mounted antenna at the customer's home, which is then sent over the Internet or a home network from a device in the home to a handheld device.[6]
- Adding a time-shift to any of these activities by recording and playing back a personal copy of a TV program.[7]

[6] The Slingbox, EyeTV, and Windows Media products do this. *See* http://www.slingbox.com/go/home; http://www.elgato.com/elgato/na/mainmenu/home/what-is-eyetv.en.html; http://windows.microsoft.com/en-us/windows/products/windows-media-center.

- Adding pause, slow-motion, and rewind capabilities to otherwise "real-time" TV viewing through use of a recording.

Each of these involves a lawful *private* transmission of a television program from an individual to herself with the assistance of a device or third-party service. The first four are functionally equivalent to the classic form of TV reception with a living-room set and a personal antenna, with the only difference being the length of the wire between antenna and set (or the replacement of that wire with an equivalent self-to-self transmission over the Internet). The last two are personal time-shifting of the type found to be noninfringing in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Using existing technologies, television viewers today can transmit over-the-air broadcasts to any number of networked devices, including mobile devices.[8] These devices are critical to the functioning of home media center software from companies such as Microsoft.[9] Other devices allow tuning and viewing over-the-air broadcast television on a computer. These tuners come in the form of an

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[7] This may occur on a digital video recorder in the home, such as a TiVo device, http://www.tivo.com, or by a personal device provided by a service provider and located at the provider's facility. *See Cartoon Network*, 536 F.3d at 124.

[8] *See* SiliconDust's HDHomeRun, http://www.silicondust.com/products/hdhomerun/atsc, (last accessed May 16, 2012).

[9] *See* Microsoft, Windows Media Center Record TV, http://www.microsoft.com/windows/windows-media-center/learn-more/recordtv/default.aspx (last accessed May 16, 2012).

internal card that must be installed inside the computer case,[10] or a small external device.[11] Still other devices allow consumers to remotely view freely available over-the-air broadcast television outside of a broadcaster's home market. Products such as the Slingbox[12] and EyeTV[13] allow a consumer to transmit local broadcast television to Internet-connected devices via the Internet.

Moreover, all of these activities are part of the evolving public perception of what it means to "watch TV." The technologies that enable these forms of private viewing are, to the viewer, part of the personal equipment that was once limited to a console television with cumbersome "rabbit ears." At the same time, the distinction between "live" and delayed viewing has blurred. Fifteen percent of television viewers watch programs at a different time from when they were broadcast,[14] and many of those who do watch "live" contemporaneous broadcasts

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[10] *See, e.g.* Hauppage's WinTV-HVR-2250, http://www.hauppauge.com/site/products/data_hvr2250.html (last accessed May 16, 2012) (comes with two tuners that allow a consumer to watch one channel and record another, in addition to a remote control to facilitate distance viewing).

[11] *See, e.g.* Hauppage's WinTV-HVR-950Q, http://www.hauppauge.com/site/products/data_hvr950q.html (last accessed May 16, 2012).

[12] Sling Media, Slingbox, http://www.slingbox.com/ (last accessed May 16, 2012).

[13] Elgato, Eyetv, http://www.elgato.com/elgato/na/mainmenu/products/software/EyeTV-app.en.html (last accessed May 16, 2012).

[14] Pat McDonough, *As TV Screens Grow, So Does U.S. DVR Usage*, Nielsen Wire, Feb. 29, 2012, http://blog.nielsen.com/nielsenwire/media_entertainment/as-tv-screens-grow-so-does-u-s-dvr-usage/ ("85% of TV content is viewed live.").

use simultaneous recording with a local or remote DVR to enable pause, rewind, and slow-motion functions The Nielsen Company now tracks delayed viewership as part of its television ratings.[15]

In each of these activities, the source of the programming is over-the-air broadcast, which anyone within range has a right to receive on the personal equipment of their choice. Any transmissions to an individual user that occur after the broadcast signal is received are not "to the public" under any reasonable understanding of that term.

Aereo's system differs from the examples above in only one respect—the antenna and certain transmission equipment (the functional equivalent of the wire between antenna and TV set) are physically located at Aereo's facility. Under *Cartoon Network*, this distinction does not transform a private, personal transmission into a transmission "to the public." As this Court explained, Section 106 of the Copyright Act "contemplates the existence of non-public transmissions," and an interpretation of that section that "obviates any possibility of a purely private transmission" cannot be valid. 536 F.3d at 136.

[15] *Television Measurement*, The Nielsen Company, http://www.nielsen.com/us/en/measurement/television-measurement.html ("Our tools capture not only what channel is being watched, but also who is watching and when, including 'time-shifted' viewing.").

The system recognized as legal in *Cartoon Network* had two salient characteristics. First, the transmissions it made were separate and unique to each subscriber; no two subscribers could view the same *transmission* even if they might be viewing the same *work*. *Id.* at 135 (Section 106 "speaks of people capable of receiving a particular 'transmission' or 'performance,' and not of the potential audience of a particular 'work'"). Second, each "transmission" began from a source to which the viewer had lawful access—in that case, a licensed cable broadcast for which the viewer had paid. *Id.* at 136.[16] This second characteristic allowed "the right of reproduction [to] reinforce and protect the right of public performance," *Id.* at 138, because the performance at issue originated from a copy that was itself subject to copyright. If the user had no legal right to access the cable broadcast, infringement would be present notwithstanding the private transmission to the viewer. *See id.*

Aereo tracks these critical characteristics in every important respect. Each user views a separate transmission from a separate antenna at Aereo's facility; the transmissions are never shared among customers. And, the origin of each transmission is a lawful, user-made copy *taken from the public airwaves*, a source

[16] "[W]e believe it would be inconsistent with our own transmit clause jurisprudence to consider the potential audience of an upstream transmission by a third party when determining whether a defendant's own subsequent transmission of a performance is 'to the public.'" *Cartoon Network*, 536 F.3d at 136.

to which the user would have lawful access by set-top antenna, roof antenna, or any of the other means listed above. As in *Cartoon Network*, the presence of both these characteristics means that Aereo neither splits a single transmission among multiple subscribers en route, as did the system found to be infringing in *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594 (S.D.N.Y. 2011), nor makes transmissions from a copy that the viewer has not validly made or purchased for private viewing, as in *Columbia Pictures Indus., Inc. v. Redd Horne Inc.,* 568 F. Supp. 494, 500 (W.D. Pa. 1983). Thus, a copyright holder is never deprived of its ability to deliver a television program to a viewer.

Plaintiffs argue that the holding of *Cartoon Network* must be limited to time-shifted recordings. WNET Br. 40; Br. of Pls.-Counter-Defs.-Appellants American Broadcasting Companies, *et al*. ("ABC Br.") 30 n.11. That interpretation is not supported by any authority, and would place unjustified limits on future television-viewing technology. Nothing in the Copyright Act or this Court's holding transforms a private transmission into a public performance when it is viewed at the same approximate time as the original television broadcast.

Nor does viewing a broadcast—live or time-shifted—using Internet technology, alter the application of *Cartoon Network*. WNET Br. 41-43; ABC Br. 25-26. A copyright holder has no greater rights when a viewer watches a baseball game on a portable TV from a park bench on a smartphone than when he watches

on his living room TV. And, limiting the holding of *Cartoon Network* to the facts of Cablevision's particular system would, in effect, limit personal TV receiver technology to that which a court has already explicitly deemed lawful. Such an interpretation would deny to the public the benefit of advances in technology, contrary to the purpose of the Copyright Act.

2. Discrete Private Performances Cannot Be "Aggregated" To Create a Public Performance.

Plaintiffs claim that the transmit clause requires that courts "aggregate" private performances to make them public. ABC Br. 5. Plaintiffs are wrong. The transmit clause simply states that a performance is public "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. Nothing in this language – or the legislative history authorizes courts to take performances that are otherwise private and group them together for the purpose of finding liability.

Indeed, if Plaintiff's view of "aggregation" prevails, then all performances are effectively public if they are susceptible at any time of being grouped with other performances. That could lead to extraordinary new forms of liability. For example, Sony, a manufacturer of CD players, might be a public performer because its customers play CDs in their houses—and each person who plays a CD

could be seen as jointly, publicly performing the musical work. Congress never intended such an absurd result.

Moreover, the notion that only the potential audience of a particular "transmission" is relevant contradicts this Court's holdings. *Cartoon Network*, 536 F. 3d at 135-138. A movie showing to an empty theater is a public performance because members of the public might potentially buy a ticket. A cable system making a single transmission available to its customers is a public performance because viewers can all "tune in" to that transmission with a single source. A typical online streaming site such as Netflix publicly performs the works in its catalog—even if its users watch them in different places, at different times—because it repeatedly makes transmissions from a limited number of copies of its works. Notably, in each of these cases there is some common element that links the different renditions together to make the audience of a particular transmission a "public."

There is no such commonality here. Each transmission that is made using Aereo's service is entirely independent of all others. Aereo's users have individual control, from directing a particular antenna to receive particular programming, to the creation of an individual copy, to the private transmission. The potential audience of each transmission is the customer who has requested it, and nothing links disparate transmissions together other than the fact that they may embody the

same work—a rationale expressly rejected in *Cartoon Network*. 536 F. 3d at 135-136. Because Aereo's system limits the potential audience for a given transmission, each performance remains wholly private and non-infringing. These performances cannot be grouped together to invent a new kind of "public" performance.

B. Aereo Users, and Not Aereo, Decide to Begin a Transmission

Even assuming *arguendo* that the performances in question were "public" – which they are not – Aereo's service is still lawful because it does not involve a volitional act leading to infringement.

Only the person who engages in a volitional act that results in an infringement can be held directly liable for the infringement. *Cartoon Network* 536 F.3d at 130-133; s*ee also UMG Recordings, Inc. v. Shelter Capital Partners, L.L.C.*, 667 F.3d 1022, 1035 (9th Cir. 2011). Therefore, in order to infringe the public performance right, Aereo must actually engage in a volitional act that begins a transmission. It does not matter if Aereo "manufactures, maintains, or . . . owns the machine" that users use for personal transmissions, *Cartoon Network*, 536 F. 3d at 121. Even if Aereo engaged in "conduct in designing, housing, and maintaining a system that exists only" to facilitate personal transmissions, *id.*, as long as an Aereo user "actually presses the button," *id.*, to begin a transmission, it is the user that "supplies the necessary element of volition."

This Court's analysis of volition in *Cartoon Network* was tied to the reproduction right, not the public performance right. *Id.* at 134. Nonetheless, the same reasoning should apply here. As the Fourth Circuit noted in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004):

> While the Copyright Act does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner's rights, it nonetheless requires conduct by a person who causes in some meaningful way an infringement.

In other words, the elements of copyright liability may be few, but they still include some element of intentionality. Here, that intention lies with the viewer, not Aereo.

C. Plaintiffs' "Chain of Transmission" Theory Does Nothing to Assist the Analysis.

Plaintiffs argue that Aereo's service operates as part of a "chain of transmission" from the broadcaster to the viewer. ABC Br. 33-35. Under this line of reasoning, Plaintiffs make a public performance when they broadcast their content, and Aereo inserts itself into this ongoing public performance, which in turn infringes the public performance right.

As advanced by Plaintiffs, the "chain of transmission" argument finds no support in statute, precedent, or logic. This Court should not adopt it. On this theory, any transmission of works received from a broadcast signal would be a public performance because the initial transmission was a public performance.

This reads the word "public" out of the transmit clause, a result this Court has rejected. *Cartoon Network*, 536 F. 3d at 136. More fundamentally, any "chain of transmission" is broken any time a broadcast signal is received. In this case, an Aereo user's antenna ends a broadcaster's transmission. Any further uses that an Aereo user, or Aereo, makes of works that are received over-the-air are entirely separate. Whether or not such uses (such as reproductions or transmissions) are infringing does not depend on the manner in which they were received. In this case, the transmissions from Aereo's facilities to its users are private and thus non-infringing. Regardless, in this context, the "chain of transmission" argument contributes nothing useful to the Court's analysis.

Plaintiffs argue that the Court should look "upstream" to determine whether the "potential audience" for a performance is the public and, if it is, find that all further retransmissions of the broadcast signal infringe the public performance right. ABC Brief 36. As this Court has explained in rejecting a similar theory:

> [t]he implication . . . is that to determine whether a given transmission of a performance is 'to the public,' we would consider not only the potential audience of that transmission, but also the potential audience of any transmission of the same underlying 'original' performance . . . Like the district court's interpretation, this view obviates any possibility of a purely private transmission."

Cartoon Network, 536 F. 3d at 136. A private transmission (such as from a homeowner's rooftop antenna to the TV in front of his houseguest inside) remains private even when it is a retransmission of a publicly performed broadcast signal.

Even if Aereo's transmissions were public, Plaintiffs' "chain of transmission" analysis makes little sense. *See* ABC Br. 33-34. Under this theory, a single "performance" can be simultaneously infringing and noninfringing. But Section 106 of the Copyright Act grants copyright holders the exclusive right "to perform the copyrighted work publicly." 17 U.S.C. 106(4). A person who infringes this right does so by creating a new public performance—not by somehow joining in with an ongoing, authorized performance.

It is true that the Supreme Court, in 1931, found that "nothing in the [1909 Copyright] Act circumscribes the meaning to be attributed to the term 'performance,' or prevents a single rendition of a copyrighted selection from resulting in more than one public performance." *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931). The Court held that a hotel that piped broadcast music around its premises publicly performed it. But the Supreme Court later expressly disowned that first attempt to reconcile broadcasting and copyright. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397 n.18 (1968).

Of course, as Plaintiffs emphasize, *Fortnightly* itself has been legislatively overturned. But Congress did not resurrect the discredited reasoning of *Jewell-LaSalle* or create a legal structure where single "renditions" of works can be performed by different parties. Rather, Congress clarified that the act of "transmission to the public" itself constitutes a new public performance. *Cartoon*

Network, 536 F. 3d at 136 ("when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission. Thus, HBO transmits its own performance of a work when it transmits to Cablevision, and Cablevision transmits its own performance of the same work when it retransmits the feed from HBO.")

The "transmit clause" simply defines what a "transmission" is and says that some transmissions are public performances. It does not create a "transmission right" in addition to the public performance right. Any "chain of transmission" is already broken whenever a new party makes a new transmission, because a broadcaster's public performance terminates when an antenna receives its signal.

III. Disruptive Innovation and Lawful Competition Are Part of the Public Interest Under Copyright Law.

Preliminary injunctions in copyright cases should discourage infringement but not innovation. Although the merits are dispositive in this case, the Court's analysis of the other equitable factors should encourage innovation and entrepreneurship by businesses like Aereo. Moreover, the Court's public interest analysis should consider how the public benefits not just from increased access to programming, but also from disruptive innovation and greater choice in television viewing technologies.

A. The History of Litigation Against Video and Audio Technologies Counsels Skepticism of Plaintiffs' Irreparable Harm Claims.

The district court was properly skeptical of the dire picture painted by Plaintiffs and supporting *amici* of Aereo's future effect on the television industry. Three decades of history suggest Aereo is much more likely to *benefit* that industry.

Plaintiffs' hyperbole has precedent. In 1982, the president of the Motion Picture Association of America famously compared the videocassette recorder to a serial killer.[17] He predicted that if Americans gained the ability to record television programs for later viewing, "[t]he investment of hundreds of millions of dollars each year to produce quality programs to theaters and television will surely decline."[18] Members of the association sued to enjoin its sale. The Supreme Court reversed that injunction, reasoning that "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials." *Sony*, 464 U.S. at 43. The VCR led to the birth of the home video market. Far from declining, investment in and revenues from film and television have grown steadily.[19]

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[17] Hearing before the Committee on the Judiciary, US House of Representatives, Testimony of Jack Valenti, April 12, 1982.
[18] *Id.*
[19] U.S. domestic box office revenues grew in 23 of the 31 years from 1981 to 2011. "Yearly Box Office," *Box Office Mojo*,

Copyright holders also brought infringement suits against the first portable digital music player,[20] one of the first digital video recorders,[21] and Cablevision's novel DVR, which moved the personal recording hardware to the cable company's offices.[22] In each case, copyright holders insisted that empowering individuals to control the time, place, and format for private viewing would spell for disaster for their industries. In *Cartoon Network*, *amici* warned that Cablevision's RS-DVR would cause "individual songwriters, composers, lyricists, and publishers" to "go uncompensated." Brief for the Am. Society of Composers, Authors & Publishers and Broad. Music, Inc. as *Amici Curiae* Urging Affirmance in Favor of Appellees 12-13, *Cartoon Network*, 536 F.3d 121 (2d Cir. 2008). Another *amicus* claimed that Cablevision's invention would "disable licensing markets." Brief of *Amicus Curiae* the Progress & Freedom Found. in Support of Appellees Urging Affirmance 3. Yet another claimed that failing to enjoin the RS-DVR would "create a gaping hole in the Copyright Act." Brief of *Amici Curiae* Am. Society of Media Photographers, Inc., *et al.*, in Support of Affirmance 19.

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http://boxofficemojo.com/yearly/?sort=year&order=DESC&p=.htm (accessed Oct. 22, 2012).

[20] *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999).

[21] *Paramount Pictures Corp. v. ReplayTV, Inc.*, No. CV-01-09358-FMC (C.D. Cal. 2001).

[22] *Cartoon Network*, 536 F.3d 121.

In fact, the RS-DVR, the portable digital music player, and the VCR all enhanced the value of creative works – including their commercial value. They also led to the birth of new revenue sources for copyright holders, such as online music stores[23] and expanded television audiences.[24]

Given this recent history, Judge Nathan wisely rejected Plaintiffs' claims that allowing Aereo to operate while this litigation was pending, would cause the sky to fall on the television industry. Plaintiffs have *not* shown that Aereo will cause the end of free broadcasts of the Super Bowl, or the end of cable retransmission payments, or preclude Plaintiffs' own specific and limited future forays into Internet content delivery. Mem. Order 43-44. No evidence in this case, or in the television industries' long history of suits against new technologies, suggests that Aereo will lead to "the inability to obtain compensation for creating very expensive programming." ABC Br. 46.

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[23] Revenues from digital music sales increased in 2011. Peter Kafka, "Pay Up? Okay. Music Buyers' Numbers Increased In 2011," AllThingsD, Mar. 6, 2012, http://allthingsd.com/20120306/pay-up-ok-music-buyers-numbers-increased-in-2011/.

[24] "'For quite a few years people thought it was going to mean the demise of the television business,' says Alan Wurtzel, president of research at NBC, an American broadcast network. Yet DVRs turn out to have done little damage. Indeed, DVRs (also known as personal video recorders, or PVRs) may even have protected television and made it more conservative." *The Revolution That Wasn't: DVRs Were Supposed to Undermine Television. They Have Done the Opposite*, (*continued from previous page*) The Economist (Apr. 23, 2009), *available at* http://www.economist.com/node/13528310.

B. The Effects of Technological Change On "The Industry Writ Large" Should Have No Bearing On An Injunction Against Aereo.

Technological change inevitably disrupts well-established markets and business arrangements. Clayton M. Christensen, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL 42 (1997). Home audio recording, FM radio, and television itself all challenged the structure and revenues of the media and entertainment titans of their day. *See generally* Tim Wu, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2011). The promise and the challenge of U.S. copyright law is to assure fair compensation for authors without interrupting or burdening the disruptive innovation that created nearly all of the existing markets for creative work.

In keeping with this commitment, courts disregard claimed harms with only a distant or speculative connection to the challenged activity. *See, e.g., Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 509 (2d Cir. 1977). In particular, the Court should disregard the WNET plaintiffs' concern for "the industry writ large." WNET Br. 46.

Moreover, as was the case with other video technologies, "the industry writ large" has largely adapted to customers' desire to view broadcast programming at the times, locations, and on the devices of their choosing. For example, the Nielsen Company has altered its surveys to account for delayed viewing, and other

audience and advertising metrics have arisen.[25] Thus, the claimed harm is not just irrelevant, it is illusory.

C. New Services Like Aereo Promote the Public Interest.

The district court's analysis of the public interest was far too narrowly focused on the public interest in copyright enforcement. As a result, it entirely overlooked the public's interest in being able to watch television *using the technology of their choosing*, including technology not controlled by broadcasters.

The Supreme Court's admonition against "categorical" presumptions and shortcuts in equity determinations means that courts must consider the public interest independently of the parties' interests. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). This Court has also recognized that the public's interest may be separate and distinct from that of the parties. *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010) (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986)).

The district court found that "[t]here is a strong public interest in the copyright system's function of motivating individuals to make their creative works available and increase the store of public knowledge." Mem. Order 50. This conclusion merely states the tautology that enforcing against violations of the law

[25] *Television Measurement*, The Nielsen Company, http://www.nielsen.com/us/en/measurement/television-measurement.html.

is in the public interest, without crediting the countervailing, equally tautological corollary that refraining from enjoining lawful activities is also in the public interest. Concluding that the public interest lies only in enforcing the law that controls the merits of the case is tantamount to collapsing the public interest inquiry into the merits inquiry and establishing a "categorical" rule forbidden by *eBay*.

The court went on to assert, erroneously, that an injunction would not disserve the public interest because "there are numerous other methods through which the public can lawfully receive access to Plaintiffs' content." Mem. Order 51. The court found a "logical gap . . . between any public interest in receiving broadcast television signals generally and the public interest in receiving them from Aereo's particular service."

The district court missed the point. The public interest at stake in this litigation is not in mere "access" alone, nor of "convenience," but rather an interest in technological choice, personal autonomy, and innovation. As Public Knowledge and EFF explained in their *amicus* brief in the district court, the government recognizes that online video distributors ("OVDs") like Aereo are a promising source of competition in the video distribution market. *See* Competitive Impact Statement of the Department of Justice, *United States v. Comcast Corp.*, 1:11-cv-00106 RJL (D.D.C. Jan. 18, 2011) ("DoJ Analysis") ECF 4, 11-30; Applications of

Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, 26 FCC Rcd 4238 (2011) ("FCC Analysis") ¶¶ 60-109.[26] In approving the merger of Comcast and NBC Universal in 2011, the Department of Justice required the merged companies to make programming available to Internet video services. This requirement, the Department concluded, would give television viewers more choices of how to receive programming, as well as more access to the programming itself. DoJ Analysis 11.

In noting the public benefits of OVDs, the Justice Department found that competitive pressure from OVDs was stimulating incumbents such as cable networks to offer more on-demand choices. DoJ Analysis 15. The Justice Department observed that, among OVDs, "[n]ew developments, products, and models are announced on almost a daily basis by companies seeking to satisfy consumer demand." DoJ Analysis 15-16. The FCC also stated that OVDs "can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices." FCC Analysis ¶ 78. Preventing more OVDs from reaching the market would therefore " have an substantial anticompetitive effect on

[26] The FCC Analysis is available at http://bit.ly/erx8Jr (*continued on next page*) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf), and the DoJ Analysis is available at http://bit.ly/fP0dPY (http://www.justice.gov/atr/cases/f266100/266158.pdf).

consumers and the market." DoJ Analysis 27. Despite their currently-small market share, the Justice Department found that the emergence and growth of OVDs was extremely significant, saying that OVDs "represent the most likely prospect for successful competitive entry into the existing video programming distribution market." DoJ Analysis 28.

Thus, there is a significant public benefit of increased competition in video distribution. That benefit weighed strongly against an injunction here.

D. Broadcasters Have Statutory Public Interest Obligations.

The broadcasters in this case try to portray themselves as copyright holders like any others, but they are more than that. Broadcasters use, for free, a resource worth billions of dollars (or more)[27]—the public radio spectrum. In exchange for

[27] Economist Thomas Hazlett has explained that "Today, the social opportunity cost of using the TV Band for television broadcasting – 294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 4G technologies – is conservatively estimated to exceed $1 trillion (in present value)." Comment of Thomas Hazlett, in A National Broadband Plan for Our Future, GN Dckt. No. 09-51, Federal Communications Commission (filed Dec. 18. 2009), *available at* http://mason.gmu.edu/~thazlett/pubs/NBP_PublicNotice26_DTVBand.pdf. More conservatively, CTIA – The Wireless Association and the Consumer Electronics Association have concluded that the FCC's broadcast incentive auctions, where only a few broadcasters would give up their licenses to more productive uses, could produce more than $33 billion in revenue for the U.S. Treasury. *See* CTIA and CEA Study Finds Broadcast Incentive Auction Will Net U.S. Treasury More Than $33 Billion, Feb. 15, 2011, http://www.ctia.org/media/press/body.cfm/prid/2051.

this, broadcasters are expected to serve the public interest. The broadcasters in this case seek to avoid, and even frustrate, that responsibility.

Broadcasters are granted licenses to operate only if the "public convenience, interest, or necessity will be served thereby," 47 U.S.C. § 307(a). They are required to "serve the needs and interests of the communities to which they are licensed."[28] If a broadcaster fails to meet its public obligations, the Federal Communications Commission can decline to renew its license. 47 U.S.C. § 309(k). Furthermore, any "party in interest" may petition the FCC to deny a license when the licensee has failed to meet its high public burden. 47 U.S.C. § 309(d).

Over-the-air broadcasters also receive special statutory rights: the right to demand carriage by cable systems, 47 U.S.C. § 534, guaranteed placement on the "basic tier," 47 U.S.C. § 543(b)(8), and the legal right to "consent" to the retransmission by cable systems of programming they may not own the copyright to, 47 U.S.C. § 325(b). In exchange for these rights—and in recognition of the fact that the number of broadcast licenses is limited—broadcasters have an obligation to serve the public. "[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." *Red Lion Broad. Co. v. FCC*, 395 U.S.

[28] Federal Communications Commission, Localism Fact Sheet, http://transition.fcc.gov/localism/Localism_Fact_Sheet.pdf.

367 (1969) (citing S. Rep. No. 86-562, at 8-9 (1959)). Accordingly, since the earliest days of broadcasting, policymakers have required stations to make their service freely available to the public.[29] The Supreme Court has held that "preserving the benefits of free, over-the-air local broadcast television" is an important government interest. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

By providing an individual, remote antenna to viewers, Aereo enhances customers' ability to watch publicly broadcasted content. Thus, attempting to limit that ability hardly comports with the broadcaster plaintiffs' obligation to serve the public. As Justice Warren Burger lamented,

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. . . . [T]he broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust.

Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). Having accepted billions of dollars in public resources and after being granted numerous regulatory special favors, plaintiffs want to renege on the deal and abandon their responsibilities. This Court should not permit it.

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[29] *See* Third Annual Report of the Federal Radio Commission 34 (1929*), available at* http://transition.fcc.gov/fcc-bin/assemble?docno=291101.

By making broadcast programming more accessible, and by creating more choices for private viewing technologies, Aereo improves and does not disrupt the free television industry. Aereo serves the public interest, and its service should not be enjoined.

CONCLUSION

Amici respectfully urge the Court to affirm the District Court's ruling, while clarifying that the public interest includes the promotion of innovation and competition.

Dated: October 26, 2012

Respectfully submitted,

/s/ *Mitchell L. Stoltz*
Mitchell L. Stoltz
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
mitch@eff.org
Counsel for Amici Curiae Electronic Frontier Foundation and Consumer Electronics Association

/s/ *Sherwin Siy*
Sherwin Siy
John Bergmayer
PUBLIC KNOWLEDGE
1818 N Street NW, Suite 410
Washington, DC 20036
Telephone: (202) 861-0020
Facsimile: (202) 861-0400
ssiy@publicknowledge.org
Counsel for Amicus Curiae Public Knowledge

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

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Dated: October 26, 2012

Respectfully submitted,

/s/ *Mitchell L. Stoltz*

Mitchell L. Stoltz
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
mitch@eff.org
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 26, 2012, a true and correct copy of the foregoing document was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

Dated: October 26, 2012

Respectfully submitted,

/s/ *Mitchell L. Stoltz*

Mitchell L. Stoltz
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
mitch@eff.org
Counsel for Amici Curiae